

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION	)	
OF DELMARVA POWER & LIGHT COMPANY,	)	
EXELON CORORPATION, PEPCO HOLDINGS	)	PSC DOCKET NO. 14-193
INC., PURPLE ACQUISITION CORPORATION,	)	
EXELON ENERGY DELIVERY COMPANY, LLC	)	
AND SPECIAL PURPOSE ENTITY, LLC	)	
FOR APPROVALS UNDER THE PROVISIONS	)	
OF 26 <i>Del. C.</i> §§ 215 AND 1016	)	
(FILED JUNE 18, 2014)	)	

**JEREMY FIRESTONE'S MEMORANDUM IN OPPOSITION TO STAFF'S BELATED  
ATTEMPT TO BAR EVIDENCE**

Jeremy Firestone  
130 Winslow Road  
Newark, DE 19711  
302 831-0228 (office/day)  
[jf@udel.edu](mailto:jf@udel.edu)  
*Pro Se*

1. On June 20, 2016, the Hearing Examiner issued the Second Amended Scheduling Order related to the Most Favored Nations Provisions (hereinafter “MFN Scheduling Order”); an order that had been negotiated by the Parties including the Public Service Commission Staff (Staff) as a means to implement the Amended Settlement Agreement. That Order provides *inter alia*

- a. “The parties shall identify for all other parties any exhibits that they intend to introduce at the hearing not later than 5:00 p.m. on Monday, August 29, 2016” ¶ 5
- b. "The parties shall file any objections related to evidence to be presented at the hearing not later than 5:00 p.m. on Friday, September 2, 2016.” ¶ 6
- c. The parties shall file any pre-hearing motions not later than 5:00 p.m. on Wednesday, September 7, 2016.” ¶ 7
- d. “Any party may file a pre-hearing submission not later than 5:00 p.m. on Monday, September 12, 2016. Submissions need not be formal briefs, but may present argument or

proposals for allocation of additional benefits as referred to in Paragraph 104 of the Amended Settlement Agreement”. ¶ 9.

e. “Not later than 5:00 p.m. on Tuesday, September 13, 2016, each party intending to introduce exhibits at the hearing will deliver ten (10) copies of such exhibits to the Hearing Examiner.” ¶ 10

f. “At the hearing, the Commission shall consider the admission of evidence and the closing of the record. Thereafter, the Commission shall hear and consider arguments from the parties or their counsel.” ¶ 11

2. In accordance with the Order, I filed Jeremy Firestone’s second supplemental expert testimony on August 29 and identified such as an exhibit (now referred to as JF-19)

3. No party filed a timely objection to JF-19 (that is by September 2) and no party timely filed a pre-hearing motion by September 7.

4. On September 12, 2016, I filed “Jeremy Firestone’s Pre-Hearing Submission in Support of Proposed Allocation of MFN Benefits” (hereinafter, Firestone Brief). My submission was in the form of a brief that relied on the evidence in the administrative record, including Jeremy Firestone’s second supplemental expert testimony (JF-19).

5. In that submission, I cited Constellation V. Public Service Commission, 825 A. 2d 872 (Del: Superior Court 2003) for the unremarkable point that the Commission's findings are required to be supported by sufficient evidence, free of error of law, satisfy due process of law, and not be arbitrary or capricious. This includes a Commission finding under paragraph 104a of the Amended Settlement Agreement (ASA). There the Commission retained the authority to allocate MFN benefits in “any manner that is consistent with the public interest.” It thus has exclusive jurisdiction over this issue as a matter of settlement and as a matter of statutory

authority. It also has authority under the ASA to consider the parties “comment” in choosing how to exercise its authority.

6. As such, for example, the Commission may allocate funds to the Delaware Economic Development Office (DEDO), but only if it finds “sufficient evidence” in the record that that particular allocation would be consistent with the “public interest” within the meaning of its statutory authority. It may also if it so chooses allocate money in a manner suggested by no party if that allocation finds support in the Administrative Record as being consistent with the public interest.

7. Moreover, what is clear in the ASA is that the Commission need not even consider comment; rather the parties “proposed[d] that the Commission invite comment from interested parties....” ASA ¶104a. But that does not mean that the Commission need not consider “evidence.” It must, as a matter of administrative law and no agreement by the parties can change that unalterable proposition of law.

8. Further, the Commission, acting through the Hearing Examiner, established a procedure to implement the “comment” language of ASA ¶104a—a procedure consented to by all parties, including Staff—that provides for the submission of additional evidence and the subsequent closing of the evidentiary record on September 20, 2016. Mr. Geddes apparently seeks to disavow the entire procedure but he is clearly estopped at this late juncture.

9. Under that procedure both the Joint Applicants and I submitted evidence. No party timely objected to either. If my evidence is invalid—which it is not—then Joint Applicants—evidence is invalid as well.

10. Further, the Commission could not as a matter of policy allocate \$27.1 million for a new building for the Delaware Public Service Commission. While such a use may well be worthy and

a case could be made that such an allocation would be consistent with the public interest, the Commission could not turn around and do so on Tuesday September 20 as a matter of law even should I structure my oral comment around such a proposal on Tuesday or even should it do so *sua sponte*. Why? Because there is no support in the administrative record for such a building. The same is true of putting a portion of MFN proceeds toward a fleet of electric vehicles for Staff use and demonstration to the public or towards a study of enhancing natural gas pipelines in New Castle County or citing a nuclear plant in Delaware or for climate change adaption, loss or damage as a result of the burning of fossil fuels for electricity. A “public interest” comment could be made for each on Tuesday, but it would not be lawful for the Commission absent further fact finding to allocate funds to these programs because those comments would not find support in the administrative record before the Commission.

11. On September 13, 2016, at approximately 11:59 am, the Hearing Examiner by email asked the parties to inform him by 5:00 pm on September 14 if any party objected to JF-19. By email just 13 minutes later, I informed the Hearing Examiner and the other parties that he had erred in seeking objections given that his own earlier order had established a binding deadline of September 2. The Hearing Examiner chose not to correct his earlier email.

12. In light of the fact that the Hearing Examiner chose not to correct his earlier email, James Geddes on behalf of Staff sent an email late in the day on September 14, objecting to JF-19 on the grounds that the issues before Commission are ones of “policy”; and not ones of “evidence.” He did so despite the fact that the MFN Scheduling Order repeatedly refers to evidence and at end refers to the closing of the evidentiary record, followed by argument based on that record. This belies Mr. Geddes’ contention.

13. Nor did Mr. Geddes address his failure to comply with MFN Scheduling Order deadlines.

14. Whatever Staff has chosen to "believe" is not relevant because Staff long ago waived its ability to object to the admission of Jeremy Firestone's expert testimony, which I submitted as evidentiary support for my position of what as a matter of law is in the public interest.

15. Not only did Mr. Geddes not object timely as required by the MFN Scheduling Order, he objected only after seeing my pre-filing submission and the implications of my testimony. He seeks to change the rules of the game in the middle of the game. To consider his objection now would unquestionably violate my rights of due process.

16. In addition to the objection being clearly afoul of the scheduling order from a timing perspective, the objection seeks to transpose an administrative proceeding into a policy forum.

17. While policy considerations may help guide the Commission, it is required to ground its administrative decisions and orders in the administrative record as a matter of law.

18. The parties have submitted testimony at various phases of the proceeding. This is simply another time when I submitted testimony. The Commission has considered testimony in this proceeding, including earlier testimony by witnesses for Staff and for me, when deciding whether to approve the merger and the Settlement Agreement.

19. The Commission had before it Jeremy Firestone's supplemental expert testimony that provided evidentiary support for the change in how the \$40 million in customer rebates was structured when it consider whether to accept amendments to specific provisions of the initial Settlement Agreement.

20. Jeremy Firestone's second supplemental expert testimony was not a "comment" by a party, but testimony—that is, "evidence" in support of my pre-hearing submission (my written comment) and my oral comment before the Commission on September 20, 2016.

21. By email dated September 14, I again informed the Hearing Examiner that he had erred by ignoring his own MFN Scheduling Order. I also pointed out that the issue of admission of my testimony was no longer properly before the Hearing Examiner, as that issue sailed on September 2, when no party objected. As I noted, to the “extent that Mr. Geddes wishes to seek the extraordinary and patently unlawful relief that is embodied in his email, he must do so before the Commission on September 20.” By email dated September 15, The Hearing Examiner broadened his course of action, entertaining further positions not just from Staff and me, but from all the parties on this issue.

22. In Vincent v. Eastern Shore Markets, 970 A.2d 160, (Del. 2009), the Delaware Supreme Court set forth the due process requirements for administrative proceedings:

In the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings. ... As it relates to the requisite characteristics of the proceeding, due process entails providing the parties with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends.

Id. at 163-64 (citations omitted) (emphasis added). Under Vincent, this docket, like a proceeding in Superior Court, is governed by due process, including fairness.

23. The continuing consideration of the admissibility of my testimony by the Hearing Examiner has created anything but an “orderly proceeding and it departs from the “official regularity” of proceedings before this Commission within the meaning of 26 Del. C. § 510. And indeed, at this point, Mr. Geddes’ belated effort to bar evidence is not properly before the Hearing Examiner; rather, any such attempt can only be had before the Commission.

24. This is now the third occasion when orders have been ignored to my detriment.

a. In response to a Motion to Compel, the Hearing Examiner did not give effect to a discovery agreement (see Interlocutory Petition of September 22, 2014 at ¶¶ 6-8), choosing as well to disregard his own scheduling order, which had established a deadline for blanket objections that the Joint Applicant's missed. Id. at ¶ 9.

b. While preparing for the 2015 evidentiary hearings, I filed a Motion in Limine. The Hearing Examiner denied my Motion, ruling that it was untimely despite the fact that I filed it more 28 hours prior to the deadline that he had earlier established in his Scheduling Order, concluding I was equitably barred because I should have filed the Motion even earlier than I did. Order 8707, ¶ 15 (Feb. 2, 2015).

25. There have been other attempts to establish unfair procedures to my detriment as well. For example, the Hearing Examiner issued an order denominated as an "agreed order" on depositions. Not only had I not agreed; I was not consulted. The order barred me from asking any questions of Exelon's witnesses in their depositions. The Commission rightly ordered that I be given an opportunity to ask questions

26. In sum, there is no legal basis for Staff's position. Moreover, from a procedural standpoint, Staff effectively waived any objection by not timely filing an objection. Further, this dispute is not properly before the Hearing Examiner; rather it resides with the Commission. The continued consideration of the objection is sadly part of a pattern of due process violations in this docket—a pattern that should be put to rest now and forever.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jeremy Firestone".

Jeremy Firestone  
September 16, 2016

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION	)	
OF DELMARVA POWER & LIGHT COMPANY,	)	
EXELON CORORPATION, PEPCO HOLDINGS	)	PSC DOCKET NO. 14-193
INC., PURPLE ACQUISITION CORPORATION,	)	
EXELON ENERGY DELIVERY COMPANY, LLC	)	
AND SPECIAL PURPOSE ENTITY, LLC	)	
FOR APPROVALS UNDER THE PROVISIONS	)	
OF 26 <i>Del. C.</i> §§ 215 AND 1016	)	
(FILED JUNE 18, 2014)	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, that on behalf of Jeremy Firestone, *Pro Se*, I filed **JEREMY FIRESTONE'S MEMORANDUM IN OPPOSITION TO STAFF'S BELATED ATTEMPT TO BAR EVIDENCE** with Delafile and served a copy of the same on all persons on the email service list by email attachment.

Respectfully submitted,



Jeremy Firestone  
16 September 2016